IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiff	)	
	)	
v.	)	Case No. 4:05-cv-00329-JOE-SAJ
	)	
TYSON FOODS, INC., et al	)	
	)	
Defendants.	)	
	)	

TYSON CHICKEN, INC.'S MOTION TO DISMISS COUNTS 4, 5, 6 AND 10 OF THE FIRST AMENDED COMPLAINT UNDER THE POLITICAL QUESTION DOCTRINE AND INTEGRATED OPENING BRIEF IN SUPPORT

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant Tyson Chicken, Inc., joined by Tyson Poultry, Inc., Tyson Foods, Inc., and Cobb-Vantress, Inc. (collectively "Defendants"), hereby move this Court for an order dismissing Counts 4, 5, 6 and 10 of the First Amended Complaint ("Complaint") on the ground that this Court lacks subject matter jurisdiction over the political questions raised therein.

II. BACKGROUND

In this action, Plaintiffs allege that the longstanding practice of using poultry litter as a natural fertilizer and soil amendment is illegal. Specifically, Plaintiffs claim that water running off fertilized fields carries nutrients and other substances into the streams of the Illinois River Watershed ("IRW") and that this runoff constitutes illegal pollution. Plaintiffs allege statutory causes of action under both federal and state law. Additionally, Plaintiffs advance various common law theories. Specifically, Plaintiffs claim that the use of poultry fertilizer creates a nuisance under Oklahoma common law (count 4) and federal common law (count 5);

constitutes a trespass upon Oklahoma's property interests under Oklahoma common law (count 6); and unjustly enriches the Defendants under Oklahoma common law (count 10).

In asking this Court to create common law to cover the facts of this case, Plaintiffs ask this Court to violate well established separation-of-powers principles to resolve politically charged environmental policy questions with sweeping implications for the economies of Arkansas, Oklahoma, and the nation at large. Expanding environmental regulation beyond the existing federal and state regimes—as Plaintiffs request—would require our nation's elected branches to strike a balance "between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes [will] retard industrial development with attendant social costs." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 847 (1984).

As explained in Tyson Foods, Inc.'s "Motion to Dismiss Counts 4-10 of the First Amended Complaint and Integrated Brief in Support," Congress has enacted a comprehensive regulatory regime in the Clean Water Act, 33 U.S.C. §§ 1251-1387, to address issues of interstate water pollution. The Plaintiffs are apparently not satisfied with the scope of the Clean Water Act as it applies to the use of poultry litter as a natural fertilizer and soil amendment, so they now ask this Court to judicially impose additional, more stringent standards via federal and state common law. This court, however, is not well situated to make the "initial policy determination" that is essential to properly balance the interests involved in creating new water pollution standards. Rather, our Constitution commits those policy decisions to the elected branches. Accordingly, the Court should decline to exercise jurisdiction over Counts 4, 5, 6 and 10 of the Complaint because they present non-justiciable political questions.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) requires dismissal when "the court does not properly have statutory or constitutional power to adjudicate the case." *Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1167 (10th Cir. 2004) (citing *Bell v. Hood*, 327 U.S. 678, 683 (1946)). Federal courts are courts of limited jurisdiction, and whether a court has subject matter jurisdiction generally should be addressed first. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* at 94-95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). "[T]he presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party." *Schlesincer v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (internal citations omitted).

IV. ARGUMENT

Contrary to well recognized separation-of-powers principles, Plaintiffs ask this Court to ignore the Clean Water Act's comprehensive regulatory regime and to use federal and state common law to judicially regulate the use of poultry litter as a natural fertilizer and soil amendment. In sum, Plaintiffs ask this Court to go beyond the statutory and regulatory principles that have been established by the elected branches and to decide sensitive political questions involving interstate water pollution. This attempt to embroil this Court in complex policy determinations should be rejected.

"The Framers based our Constitution on the idea that the separation-of-powers enables a system of checks and balances, allowing our Nation to thrive under a Legislature and Executive that are accountable to the People, subject to judicial review by an independent Judiciary." *Connecticut v. American Elec. Power Co.*, Nos. 04 Civ. 5669, 04 Civ. 5670, 2005

WL 2347900, at *1 (S.D.N.Y. Sept. 22, 2005) (citing *Federalist Paper* No. 47 (1788); U.S. Const. arts. I, II, III). The Supreme Court has routinely held that political questions are not the proper domain of the federal courts. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *Nixon v. United States*, 506 U.S. 224 (1993). The rationale for this limitation flows from the most fundamental principles of our political and legal systems: "Were judges to resolve political questions, there would be no check on their resolutions because the Judiciary is not accountable to any other branch or to the People." *American Elec. Power Co.*, 2005 WL 2347900, at *1. Thus, "judicial review [of cases involving political questions] would be inconsistent with the Framers' insistence that our system be one of checks and balances." *Nixon*, 506 U.S. at 234-35.

In determining whether a case "is justiciable in light of the separation of powers ordained by the Constitution, a court must decide 'whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.'" *American Elec. Power Co.*, 2005 WL 2347900, at *5 (quoting *Baker*, 369 U.S. at 198). The Supreme Court has recognized six situations in which an otherwise valid legal claim should be dismissed due to the existence of a non-justiciable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Vieth v. Jubelirer, 541 U.S. 267, 277-78 (2004) (quoting *Baker*, 369 U.S. at 217).

A recent case amply demonstrates that Plaintiffs' common law claims present nonjusticiable political questions. In *Connecticut v. American Electric Power Co.*, 2005 WL 2347900, a federal district court found that an attempt to judicially regulate air pollution through common law causes of action was barred by the third factor above: "the impossibility of deciding [what standards should be applied to regulate carbon dioxide emissions under the common law] without an initial policy determination of a kind clearly for nonjudicial discretion." *Vieth*, 541 U.S. at 277-78.

In *American Electric Power*, the State of Connecticut and other States asserted claims under state and federal common law against a number of private energy producers. *American Elec. Power*, 2005 WL 2347900, at *1-2. Specifically, the States alleged that carbon dioxide emissions from the defendants' power plants cross state boundaries and contribute to the environmental phenomenon known as "global warming," thus causing irreparable harm to both the States' citizens and property located within the States. *Id.* at *2. Although Congress has extensively regulated air pollution in general,[1] and air pollution from electric power plants in particular,[2] under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, the States were apparently

[1] *See Environmental Def. v. E.P.A.*, 369 F.3d 193, 196-97 (2d Cir. 2004) ("The Clean Air Act (Act), 42 U.S.C. §§ 7401 *et seq.* (2000), establishes a comprehensive regulatory scheme designed to promote public health by enhancing the nation's air quality.") (citing 42 U.S.C.§ 7401(b)(1)); s*ee also Massachusetts v. E.P.A.*, 415 F.3d 50, 73 (D.C. Cir. 2005) ("As the 1977 House Report explained, 'the Clean Air Act is the comprehensive vehicle for protection of the Nation's health from air pollution. In the committee's view, it is not appropriate to exempt certain pollutants or certain sources from the comprehensive protections afforded by the Clean Air Act.'") (citing H.R. Rep. No. 95-294, at 42-43); *Sierra Club v. E.P.A.*, 311 F.3d 853, 854 (7th Cir. 2002) ("The Clean Air Act (CAA), 42 U.S.C. § 7401, *et seq.*, first enacted in 1970 and extensively revised in 1977 and 1990, establishes a complex and comprehensive regulatory system to reduce air pollution nationwide.")

[2] *See, e.g., United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005) (considering whether improvements to plants that allowed increased hours of operation but did not alter plants' hourly rate of emissions did not constitute type of modifications within the meaning of the Clean Air Act for which permits were required); *Wisconsin Elec. Power Co. v. Reilly*, 893

dissatisfied with the Clean Air Act's failure to remedy the alleged pollution. Accordingly, the States did not allege a claim under the Clean Air Act but rather sought a remedy under federal and state common law. *See id.* at *1. In other words, the States' claim against the power producers were in all relevant respects identical to Oklahoma's attempt to avoid the Clean Water Act in this case by asserting claims under federal and state common law.

The district court dismissed the States' common law claims under the political question doctrine. *Id.* at *7. The court focused on the fact that Congress has yet to make the difficult "initial policy determinations" that would be necessary to expand existing federal and state regulation of air pollution to cover the claim asserted by the States. *Id.* at *5-6. The court found that the States' claims were of a "transcendently legislative nature" because to grant the relief requested would require the court to determine sensitive policy issues such as: (1) the appropriate levels at which to cap carbon dioxide emissions; (2) the appropriate percentage reduction to impose; and (3) the appropriate schedule on which to implement the reductions. *Id.* at *6. Additionally, the court noted the need to balance the implications of the relief the States requested—relief that would have required an entire industry to change its historic practices—with the alleged environmental benefits that would result. *Id.* Because the defendants' business are a critical part of the regional and national economy, the *American Electric Power* court expressed concern that it was being asked to formulate environmental policies that would have major economic implications. *See id.* at *6-7. In these circumstances, the court declined to create and impose its own environmental standards under the common law, holding that the

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F.2d 901 (7th Cir. 1990) (considering whether renovations to power plant constituted physical change for purpose of determining whether renovation constituted modification within meaning of the Clean Air Act which would subject plant to new source performance standards).

policy decisions associated with the States' claims "must be made by the elected branches before a non-elected court can properly adjudicate" the States' claims. *Id.* at *6-8.

In the instant case, the nature of Plaintiffs' claims and the relief they seek is directly analogous to the global warming claims that the *American Electric Power* court rejected. In both cases, the state plaintiffs asked the respective courts to judicially create new environmental regulations because they were not satisfied with the comprehensive regulatory regimes that Congress had enacted—the Clean Air Act in *American Electric Power* and the Clean Water Act here. As in *American Electric Power*, the Plaintiffs' claims in this case are of a "transcendently legislative nature" because the elected branches have not yet made the complex initial policy decisions necessary to expand the Clean Water Act beyond its current scope. To grant the relief requested by Plaintiffs under the common law, this Court would have to undertake the following legislative functions: (1) conduct an analysis of the appropriate levels at which to cap individual farmers' use of poultry litter as a natural fertilizer and soil amendment; (2) determine the appropriate percentage reduction, if any, to impose on farmers throughout the IRW; (3) create a schedule to implement those reductions; and (4) balance the regional and national economic impact of granting such relief. These steps are identical to the steps that led the court in *American Electric Power* to decline jurisdiction. *See id.* at *6-7.

V. CONCLUSION

In accordance *American Electric Power* and well established separation-of-powers principles, this Court should decline to exercise jurisdiction over counts four, five, six, and ten of the Complaint.

VI. JOINDER BY TYSON DEFENDANTS IN MOTION TO DISMISS FILED BY PETERSON FARMS, INC.

The Tyson Defendants hereby join in and incorporate by reference all statements, arguments and points of authority contained in Peterson Farms, Inc.'s Motion to Dismiss and, or in the Alternative, Motion to Stay Proceedings Pending Appropriate Regulatory Agency Action and Brief in Support.

Dated: October 3, 2005

Respectfully submitted,

/s/ Stephen L. Jantzen
Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
RYAN, WHALEY & COLDIRON, P.C.
900 Robinson Renaissance
119 North Robinson, Suite 900
Oklahoma City, OK 73102
(405) 239-6040 (phone)
(405) 239-6766 (fax)

-AND-

Thomas C. Green, appearing pro hac vice
Mark D. Hopson, appearing pro hac vice
Timothy K. Webster, appearing pro hac vice
Jay T. Jorgensen, appearing pro hac vice
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
(202) 736-8000 (phone)
(202) 736-8711 (fax)

-AND-

Robert W. George, OBA #18562
KUTAK ROCK LLP
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
(479) 973-4200 (phone)
(479) 973-0007 (fax)

Attorneys for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2005, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson
OFFICE OF ATTORNEY GENERAL
State of Oklahoma
2300 N. Lincoln Blvd, Suite 112
Oklahoma City, OK 73105
ATTORNEY FOR PLAINTIFF

David Phillip Page
James Randall Miller
Louis Werner Bullock
MILLER KEFFER & BULLOCK
222 S KENOSHA
TULSA, OK 74120-2421
ATTORNEYS FOR PLAINTIFF

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
RIGGS ABNEY NEAL TURPEN
ORBISON & LEWIS
502 W 6th St
Tulsa, OK 74119-1010
ATTORNEYS FOR PLAINTIFF

Robert Allen Nance
Dorothy Sharon Gentry
RIGGS ABNEY NEAL TURPEN
ORBISON & LEWIS
5801 N Broadway
Ste 101
Oklahoma City, OK 73118
ATTORNEYS FOR PLAINTIFF

A. Scott McDaniel
Chris A. Paul
Nicole M. Longwell
Philip D. Hixon
Martin A. Brown
JOYCE, PAUL & MCDANIEL, P.C.
1717 South Boulder Ave., Ste 200
Tulsa, OK 74119
ATTORNEYS FOR PETERSON FARMS, INC.

Theresa Noble Hill
John H. Tucker
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
POB 21100
100 W. 5th Street, Suite 400
Tulsa, OK 74121-1100
ATTORNEYS FOR CARGILL, INC., and CARGILL TURKEY PRODUCTION, INC.

R. Thomas Lay, Esq.
KERR, IRVINE, RHODES & ABLES
201 Robert S. Kerr Ave., Suite 600
Oklahoma City, OK 73102
ATTORNEYS FOR WILLOW BROOK FOODS, INC.

and I further certify that a true and correct copy of the above and foregoing will be mailed via regular mail through the United States Postal Service, postage properly paid, on the following who are not registered participants of the ECF System:

William H. Narwold **MOTLEY RICE LLC** 20 Church St., 17th Floor Hartford, CT 06103 **ATTORNEYS FOR PLAINTIFF**	Elizabeth C Ward Frederick C. Baker **MOTLEY RICE LLC** 28 Bridgeside Blvd Mount Pleasant, SC 29464 **ATTORNEYS FOR PLAINTIFF**
C. Miles Tolbert **SECRETARY OF THE ENVIRONMENT** State of Oklahoma 3800 North Classen Oklahoma City, OK 73118	

/s/ Stephen L. Jantzen
STEPHEN L. JANTZEN